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IN THE

Supreme Court of the United States

October Term, 1966

No. 1065

MICHAEL MYERSON, a/k/a MEYER MYERSOHN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Michael Myerson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 16, 1966.

A. The Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit in this case has been reported in 368 F. 2d 393 (1966), and is set forth in Appendix A to this Petition.

B. Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 16, 1966, affirming the judgment of conviction of the United States District Court for the Southern District of New York, entered December 22, 1965. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, United States Code, and Rule 19 of the Supreme Court Rules, to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Whether the statute of limitations upon criminal tax prosecutions contained in Title 26 U. S. C. §6531 is suspended where no detriment to, or interference with, the tax investigation results from the physical absence of a taxpayer from the United States.

2. Whether Title 26 U. S. C. §6531, as interpreted and applied by the Courts below so as to suspend the running of the statute of limitations therein contained when a taxpayer is physically "outside the United States" without more, is violative of the due process clause of the Fifth Amendment to the Constitution.

3. Whether the conditions under which the jury deliberated deprived the petitioner of this constitional right to a fair trial.

4. Whether the failure of trial counsel to object to the continued deliberations by the jury during the blackout, precludes petitioner from raising that ground before this court.

D. Constitutional Provisions, Statutes and Rules

The constitutional provisions, statutes and rules involved are:

1. Amendment V, United States Constitution
2. Amendment VI, United States Constitution
3. Section 6531; Title 26, United States Code
4. Rule 52(b), Federal Rules of Criminal Procedure

All of the foregoing are set forth in Appendix B, annexed to this Petition.

E. Statement

A one count indictment was filed charging petitioner with a violation of Section 7201, Title 26, United States Code, for the calendar year 1956. After a sixteen-day jury trial, petitioner was found guilty on November 9, 1965. On December 22, 1965 petitioner was sentenced to imprisonment for four years. On January 3, 1967 petitioner was reduced to imprisonment for a term of three years.

Petitioner filed his federal income tax return for the year 1956 on February 5, 1957. The six year period of limitations commenced to run from the last date upon which the 1956 return was due, to wit, April 15, 1957, and the six years terminated as of April 15, 1963. The Government filed the indictment below, charging the appellant with income tax evasion with respect to this 1956 return, on August 8, 1963, or some 115 days subsequent to April 15, 1963 (26).*

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* References are to pages of the appendix herein.

While the evidence adduced by the Government established that the petitioner was physically outside the territorial limits of the United States for a period in excess of 115 days during 1957, the Government offered no evidence with respect to the effect of such absence upon any examination or investigation by the Internal Revenue Service during his absence nor did the Government present any evidence as to the reason or purpose for such absence. It is also clear that the tax investigation out of which the indictment resulted did not commence until long after the final day of the 115 days of petitioner's absence proved by the Government.

The Government's case against the petitioner cannot stand, therefore, unless mere physical absence from the United States during the six year period of limitations, no matter how bona fide or innocuous, suspends the running of the statute of limitations, even though it is clear that such absence had no conceivable effect of any nature whatever upon the Government's tax investigation.

On the last day of trial herein, November 9, 1965, the jury heard final defense testimony, summations of both counsel, lunched about 1:00 p.m. and were instructed by the Court. At 5:10 p.m. the jury retired to begin deliberations and at 5:28 p.m. there was a complete power failure in the court house as well as over most of New York City and the northeast (28). From 5:28 p.m. until approximately 4:00 a.m. on November 10, 1965 when power was restored, or some ten and one-half hours, the jury sat in darkness, and attempted to consider the issues presented in this case, the trial of which had lasted for sixteen days. Approximately 15 minutes later, at 4:15 a.m., the jury returned a verdict of guilty (29).

At about 10:00 p.m. presiding Judge Tenney had attempted to arrange transportation for the jury to retire for the night to the Hotel Manhattan. However, at approximately 10:45 p.m., when the jurors were asked whether they wished to go to the hotel, after consideraiton they decided due to the fact that one member of the jury had a heart condition and the jury room was on the 13th floor of the Court house and the hotel rooms were on the 11th floor of the Manhattan Hotel, they would decline the offer. No elevators were operating in either building. The jury remained in darkness thereafter until 4:00 a.m., as aforesaid.

REASONS FOR GRANTING THE WRIT

I

The construction by the Courts below that Title 26, United States Code, Section 6531 suspends the statute of limitations upon criminal tax prosecutions if, and for as long as, a taxpayer is physically outside the United States, without more, is erroneous because it is not consonant with the manifest congressional purpose behind the statute.

The construction and application of the suspension provision of the statute of limitations upon criminal tax prosecutions (26 U. S. C. §6531) by the Courts below is not consistent with the rational congressional purpose behind the statute, and produces unjust and absurd results violative of the manifest general purpose behind criminal statutes of limitations. The interpretation below, moreover, conflicts with the approach of several Courts including the Court of Appeals for the Fourth Circuit, in applying the predecessor statute of limitations contained in the 1939 Code, which conflict was not resolved by the 1954

Code now contained in 26 U. S. C. §6531. This confusion can entirely and finally be eliminated by this Honorable Court if this petition is granted, with the desirable result that the primary purpose of definiteness of application, which underlies the statute of limitations itself, may be hereafter fulfilled in all respects. Finally, petitioner respectfully submits that if the interpretation and application of the statute of limitations by the Courts below is correct, this petition should be granted for the compelling reason that, thus construed and applied, the statute violates the due process clause of the Fifth Amendment (See Point II, *infra*).

The opinion of the District Court herein, which was affirmed and adopted without qualification by the Court of Appeals, was that the statute of limitations contained in Title 26, United States Code, Section 6531 is suspended wherever, and for as long as, a taxpayer is physically absent from the United States:

> "irrespective of the reasons for his non-presence; irrespective of whether his non-presence impeded the investigation; and irrespective of whether his non-presence was sporadic or more permanent."

The only evidence presented below by the Government with regard to the Statute of Limitations, was that petitioner was physically present in Canada during 1957 for more than 115 days. The tax investigation relating to petitioner for the year in question did not commence until 1959. No proof was adduced below of any effect upon, or detriment to, the tax investigation by reason of the proven absence of petitioner from the United States, or tending to show that petitioner was a fugitive.

The 1954 Code changed the suspension of the statute of limitations provision of predecessor section of the 1939

Code [Section 3748(a)] in two respects. First, it added the concept of suspension of the statute when the taxpayer is a "fugitive from justice within the meaning of 18 U. S. C. 3290". Second, it changed the application of the suspension provision from where the taxpayer is "absent from the district wherein the offense is committed" to where the taxpayer is "outside the United States."

The latter concept of "absence from the district" contained in Section 3748 of the 1939 Code was itself the subject of conflicting decisions regarding its application. In one line of cases the Courts refused to apply the suspension provision literally so as to suspend the running of the statute based solely upon a taxpayer's physical absence from the District.* On the other hand, several Courts did apply the statutory language literally, holding that the statute is suspended solely upon the basis of the physical absence of the taxpayer from the district wherein the offense was committed.**

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* See *United States* v. *Eliopoulos*, 45 F. Supp. 777, 781 (D. C. N. J. 1942); *United States* v. *Gross*, 159 F. Supp. 316 (D. Nev. 1958); *United States* v. *Beard*, 118 F. Supp. 297 (D. Md. 1954); *United States* v. *Montgomery*, 158 F. Supp. 267 (E. D. Pa. 158); *United States* v. *Goodman*, 178 F. Supp. 338, 343 (D. C. Va. 1959), *rev'd on other gds.*, 289 F. 2d 256 (4th Cir. 1961); *United States* v. *Jurzykowski*, 159 F. Supp. 7 (N. D. N. Y. 1957) and the unreported decision in *United States* v. *Altruda*, No. C 143-52 (S. D. N. Y. 1953) *rev'd on other gds.*, 224 F. 2d 935 (2d Cir. 1955).

** See *United States* v. *Frankel*, 26 A. F. T. R. 1114 (S. D. N. Y. 1939); *United States* v. *Patentore*, 81 F. Supp. 1000 (S. D. N. Y. 1945); *United States* v. *Satz*, 109 F. Supp. 94 (N. D. N. Y. 1952); *United States* v. *Hershenson*, 131 F. Supp. 782 (S. D. N. Y. 1955); *United States* v. *Greenfield*, 131 F. Supp. 843 (E. D. N. Y. 1955); *United States* v. *Udell*, 109 F. Supp. 96 (D. Del. 1952); *United States* v. *Foster*, 197 F. Supp. 387, 394-6 (D. Md. 1961), *rev'd on other gds.*, 309 F. 2d 8 (4th Cir. 1962); *United States* v. *Mathis*, 28 F. Supp. 582 (D. C. N. J. 1939); and *United States* v. *Anthracite Brewing Company*, 11 F. Supp. 1019 (N. D. Pa. 1935).

Given such conflicting decisions as to whether or not the statute should be interpreted literally, the chaotic state of the law under this portion of Section 3748 of the 1939 Code could only be described as an "olla-podrida". *United States* v. *Gross, supra.* A leading commentator in the field has summarized that state of the law as follows:

> "The circumstances under which absence from the jurisdiction under the 1939 Code tolled the running of the statute was subject to somewhat conflicting opinions. The test seemed to be whether the absence interfered in some manner with the ordinary method of finding an indictment or constituted an interference to the execution of process." 10 Mertens, "Law of Federal Income Taxation", §55A, 15, P. 75, fn. 2.

In view of the surprising absence of legislative history upon this issue behind the enactment of Section 6531 of the 1954 Code, petitioner respectfully submits that the above described confusion of the Courts has not at all been put to rest by the change wrought by that section. The addition contained therein of the concept of suspension of the statute where the taxpayer is a fugitive and the limitation of suspension to where the taxpayer is "outside the United States" instead of "absent from the district" does not settle the issue presented herein, namely, whether *physical* absence, without more, is sufficient to toll the statute. Petitioner respectfully submits that the case at bar presents the appropriate vehicle whereby this Honorable Court may, and should, finally settle the confusion presented by the foregoing authorities which, in principle as well as in direct application, persist under the "outside the United States" language of the present code, 26 U. S. C. §6531.

The correct interpretation of 26 U. S. C. §6531, it is respectfully submitted, is that the physical absence of a taxpayer from the United States cannot suspend the statute if it had no adverse effect whatsoever upon the Government's tax investigation. This is precisely the interpretation by commentators of the conflicting cases under 1939 Code (see 10 Mertens, *supra,* §55A. 15, P. 75, fn. 2), and of Professor J. Carrigan, in 11 Tax Law Review at P. 155 (1958):

> "It must be conceded that the 1954 Code has taken the first bold step toward providing equal protection against stale prosecutions for tax crimes. The precise length of that first step must await judicial measurement. It may be assumed that the status 'fugitive from justice' will retain for future tax cases its well established judicial definition requiring intent and flight or concealment. However, no meaning may be assumed for the newly-coined half of the tolling proviso, *for Congress has fallen far short of achieving clarity of expression by substituting the broad but indefinite phrase 'outside the United States' for the unfortunate 'absent from the district'.* It is hoped that courts will credit the general Congressional intent to liberalize the tolling proviso by construing 'outside the United States' to suspend the statute only against one outside the reach of federal process and *only during absences extended enough to interfere with the Government's normal procedures.*"

It must be noted, in this regard, that an apparent conflict exists between the interpretation of Section 3748 (a) of the 1939 Code by the Court of Appeals for the Fourth Circuit in *United States* v. *Goodman, supra,* 289 F. 2d at 262, and that of 26 U. S. C. §6531 by the Court of Appeals

for the Second Circuit below, which, as aforesaid, has not been settled by §6531 of the 1954 Code.

The interpretation urged herein by petitioner is consonant with the rationale and supervening Congressional purpose behind such a statute. Prof. J. Carrigan succinctly stated this purpose as follows:

> "Purposes served by criminal statutes of limitations are several and diverse. Most obvious, and probably most important, is their function of shielding the innocent from conviction long after witnesses and proofs necessary to their defense have disappeared. Even where evidence is neither lost nor destroyed, the erosive force of time undermines its reliability and weakens its persuasive power. Public policy favors prompt enforcement of criminal sanctions to deny the lawbreaker even a temporary profit from his crime, and it is claimed that limitations statutes implement this policy by keeping law enforcement officers current in their work. Furthermore, it is thought that they act as checks on prosecutors to prevent the waste of public funds on frivolous, capricious, or vexations actions brought upon proof so time worn as to render conviction unlikely.
>
> "From earliest times, the United States has consented to time limitations on its right to prosecute those who violate federal law, but since 1790 every statute of limitations of general application to federal crimes has contained a tolling provision excepting from the statutory protection persons 'fleeing from justice.' The apparent rationale behind the tolling proviso was that one who fled the jurisdiction or *concealed himself to hinder inves-*

tigation or escape prosecution should not be entitled to the special amnesty granted by the limitations statutes." 11 Tax L. Rev., at (137-138) (Emphasis supplied).

The decisions below in the case at bar are not consonant with this clear policy behind the statute of limitations or its traditional exception. If there is no causal connection whatsoever between absence from the jurisdiction and any detriment or hindrance to the tax investigation, there exists absolutely no rational purpose, grounded in policy or otherwise, for suspending the running of the statute.

The Government argued below that such a construction is impermissible since Section 6531 of the 1954 Code now suspends the statute where the taxpayer is "a fugitive from justice" and thus there would be no purpose to the phrase "outside the United States" as construed by petitioner. This contention obscures the issue and totally fails to take account of the fact that the concept of "fugitive" is well defined and constitutes a narrower and distinct concept than the construction of the phrase "outside the United States" which petitioner urges. As the District Court below pointed out, a "fugutive" is defined as one who flees "with the intention of avoiding being brought to justice for a particular offense * * * ". *Streep* v. *United States,* 160 U. S. 128, 133 (1895). A person may not be a "fugitive" under this test, but still may prejudice the Government by detrimenting, impeding, hindering or delaying the tax investigation because of his absence from the United States, irrespective of his intent.

The construction we urge provides a clearer rationale than that of the Courts below for the "outside the United States" portion of §6531, as covering, as we have demonstrated, a class of taxpayers not at all embraced within

the term "fugitive". This construction does not place upon the Government any substantial or "obvious burden of proving the nature or purport of the defendant's stay while outside the jurisdiction" as the Government argued below. Our contention is that Congress intended that there must be a causal connection between some detriment to the Government in its tax investigation and the taxpayer's absence from the United States. In practice, the proper application of the tolling provision in question would be invoked upon proof by the Government that some detriment to its investigation was, in fact, caused by the absence of the taxpayer from the United States, such as any attempt by the Internal Revenue Service or the Deparement of Justice to summon or even to informally contact the taxpayer during his absence from the United States. The Statute would then be tolled until the taxpayer's return. It will readily be observed that virtually no burden is placed upon the Government as a result of the construction we urge, inasmuch as it will readily have such requisite proof of detriment in its own files.

The interpretation of the statute which petitioner now urges is therefore more logical and rational than that adopted below, and is also consistent with the prior decision of this Court that statutes of limitation should be construed liberally in favor of the accused. *United States* v. *McElvain,* 272 U. S. 633 (1926). Exceptions thereto must therefore be narrowly construed. *United States* v. *Scharton,* 285 U. S. 518 (1932).

Finally, the construction of the statute below necessarily results in lengthy and indeterminate extensions of the statue of limitations, which, being at variance with the very purpose thereof, are not favored. *Grunewald* v. *United States* 353 U. S. 391, 401 (1951); *Krulewitch* v. *United States,* 336 U. S. 440, 455-6 (1949).

II

Title 26, United States Code, Section 6531, as interpreted below so as to provide for the tolling of the statute of limitations upon criminal tax prosecutions if a taxpayer is physically absent from the United States without more, violates the due process clause of the Fifth Amendment.

If the construction of §6531 by the Courts below is correct, petitioner respectfully submits that total absence of the requisite rationale relationship between the mere absence of taxpayers from the United States and the purpose behind the criminal statute of limitations renders the statute flagrantly arbitrary and discriminatory against those taxpayers who travel, thereby violating the Due Process Clause of the Fifth Amendment.

Although the Fifth Amendment contains no Equal Protection Clause, it does forbid discrimination so unjustifiable as to constitute a violation of due process of law. *Schneider* v. *Rusk,* 377 U. S. 163, 169 (1964); *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954); *Taylor* v. *United States,* 320 F. 2d 843 (9th Cir. 1963), *cert. denied,* 376 U. S. 916 (1964).

The construction of the statute adopted by the Courts below necessarily subjects those taxpayers who travel outside the United States for any purpose, whether for business or pleasure, *bona fide,* or not to a statute of limitations upon tax prosections lengthened by the time they are abroad, *and for that reason alone.* Thus taxpayers who travel abroad are subjected to a longer statute of limitations, varying with the length of time spent outside the United States, than those who remain within the confines of the United States, totally irrespective of whether the

tax investigation is prejudiced thereby. A more arbitrary discrimination is difficult to imagine, and this Court has already invalidated a statute which involved a similar classification. See *Schneider* v. *Rusk, supra,* 377 U. S. at 169.

A statute of limitations is not a matter of legislative grace, but is a substantive right. *United States* v. *Auto Rental Company, Inc.,* 187 F. Supp. 603 (W. D. Pa. 1960); *United States* v. *Haramic,* 125 F. Supp. 128 (W. D. Pa. 1954). Unlike the statute of limitations in a civil case, it creates a bar to prosecution, *Chaifetz* v. *United States,* 288 F. 2d 133 (App. D. C. 1960), *rev'd in part* 366 U. S. 209, *reh. den.* 366 U. S. 955 (1961); *Benes* v. *United States,* 276 F. 2d 99 (6th Cir. 1960). It is a limitation upon the power of the sovereign to act against the accused. *Waters* v. *United States,* 328 F. 2d 739 (10th Cir. 1964), and is consonant with a policy of repose that is fundamental to our society, and our criminal law. *Bridges* v. *United States,* 346 U. S. 209 (1953).

If mere absence from the United States, without a showing of detriment to the tax investigation, is held sufficient to satisfy the suspension portion of §6531, the resulting arbitrary classification, in effect, penalizes those taxpayers who travel, and deprives them of their substantive right to the protection of the statute of limitations as long as their travel continues. This discrimination is not only essentially arbitrary, but its very basis is invalid, since the right to travel is an inalienable and fundamental right of every citizen. *Kent* v. *Dulles,* 357 U. S. 117, 125-7 (1958).

If Section 6531 cannot be logically and fairly construed in the manner set forth in Point I, *supra,* so as to rationally effectuate the manifest intent of Congress, petitioner respectfully submits that it is violative of the Due Process Clause of the Fifth Amendment.

III

The petitioner was deprived of a fair trial because the jury was unable to deliberate the guilt or innocence of the defendant in a free, untrammeled and unaffected manner.

The jury, in the instant case, was confronted with such monumental physical and mental discomfort that it was impossible for them to deliberate fairly and intelligently about the guilt or innocence of the petitioner.

On the last day of trial, November 9, 1965, at 5:10 p.m. the jury retired to begin deliberations (28). At 5:28 p.m. there was a complete electric power failure in the court house as well as over most of New York City and the northeastern portion of the United States (28). From 5:28 p.m. until approximately 4:00 a.m. on November 10, 1965, some ten and one-half hours, the jury sat in darkness, presumably unable to properly examine the numerous exhibits offered at trial, or discuss and consider the issues in the case in a normal, anxiety-free environment.

Finally, at about about 4:00 a.m. on November 10, 1965, power was restored in the court house and at 4:15 a.m., just fifteen minutes thereafter, the jury found the petitioner guilty. No doubt, they were all happy and relieved at being able to have terminated their ordeal and return to their homes.

This Honorable Court has never permitted any element of coercion to play any part in the verdict of a jury. If it finds that a ten and one-half hour "blackout" *could have* sufficiently disturbed the calm equilibrium of the members of the panel, then the instant petition should be granted.

It is not necessary that petitioner specify with particularity the manner in which he was prejudiced. As this

Court has stated: "* * * [A]t times a procedure employed * * * involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes* v. *United States,* 381 U. S. 532, 542-543 (1964) "* * * [O]ur system of law has always endeavored to prevent even the *probability* of unfairness." * * * [T]o perform its high function in the best way, 'justice must satisfy the appearance of justice' *Offutt* v. *United States,* 348 U. S. 11, 14." *In re Murchison,* 349 U. S. 133, 136 (1955) (Emphasis supplied). The undisputed circumstances in this case under which the jury deliberated clearly demonstrate that petitioner did not have a fair and just trial before a fair and impartial jury as guaranteed by the Fifth and Sixth Amendments, in that, the circumstances were so inherently anxiety provoking and diverting that only an extraordinary man could be expected to retain even a small measure of objectivity with which to weigh petitioner's fate. This is truly a situation where prejudice to the accused may be presumed. See *Estes* v. *United States, supra,* and *In re Murchison, supra.*

The Court below held that: "Moreover, appellant's attorney both consented during the trial to the jury's continued deliberations in spite of the blackout and failed to object at the end of the trial even though the trial judge invited comment when he read a summary of the night's events into the record" (21, 22). Rule 52(b), Federal Rules of Criminal Procedure, however, provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Although held to be a discretionary power, *On Lee* v. *United States,* 343 U. S. 747, 750 (1952), it has been frequently exercised as an "inherent power" of this Court "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation

of judicial proceedings." *United States* v. *Atkinson,* 297 U. S. 157, 160 (1936).

Rule 52(b) contemplates a class of "plain error"—error so fundamental that the appellate court will reverse because of it—even though it was not objected to below, and, further, if the error is of such a character that its natural effect is to prejudice petitioner's substantial rights, the burden of sustaining the verdict rests upon the prosecution. *Kotteakos* v. *United States,* 328 U. S. 750, 760 (1946). "A choice made by counsel not participated in by the [defendant] * * * does not automatically bar relief * * * " *Fay* v. *Noia,* 372 U. S. 391 (1963). Mr. Justice Frankfurter's separate opinion in *Brown* v. *Allen,* 344 U. S. 433 (1953) stated that: " * * * rights under the Federal Constitution may be waived at the trial." "However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding * * * " (citations omitted) (p. 503).

If this Court finds that petitioner's right to a jury, free from external causes and influences which would *tend* to disturb the full and untrammeled exercise of its judgment was violated, then it must conclude that such disturbance goes to the very foundation of our judicial system and was not "waived."

CONCLUSION

For the reasons hereinabove set forth, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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